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Supreme Court, U.S.
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No. 97646

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

DENNY'S, INC.,
Petitioner,
v.
RONALD K. THOMAS,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the Tenth Circuit

PETITIONER'S REPLY BRIEF

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Respondent Ronald K. Thomas ("Thomas") has opposed Petitioner Denny's Inc. ("Denny's") Petition for Writ of Certiorari. Denny's hereby submits its Reply to Thomas' Response Brief.

REPLY TO COUNTERSUMMARY OF FACTS

In his Countersummary of Facts, Thomas argues that because certain members of Denny's management recommended Thomas for promotion into management, this proved he was qualified for promotion. The argument assumes that because these former managers expressed their opinion of Thomas' qualifications at trial that the jury and trial court found them credible. However, the jury and trial judge found that Thomas was not qualified for promotion into management. Moreover, Thomas fails to acknowledge the following evidence produced at trial that had a tremendous impact on the jury's and the trial court's findings:

(1) Several members of management testified that Thomas told them that he had completed the preparatory management packet ("PMP"), and as a result they recommended him for promotion. However, Thomas did not complete the packet, and these managers learned at trial for the first time that Thomas had not completed the PMP. (Pet. App. at A-61 to A-62; A-115 to A-116; Pet. Supp. App. at 1-2)

(2) Denny's requested that Thomas, and other employees seeking promotion, complete the PMP (also known as unit promotable packet "UPP") and college courses to assist them in developing their knowledge of the restaurant industry. The other employees complied with Denny's objective job requirements for promotion into management. (Pet. at 16.) However, Thomas did not complete the PMP and did not complete any courses that would assist him in understanding the operations of a restaurant.

(3) John Lynch ("Lynch"), a former General Manager who had recommended Thomas for management and who was called as a witness in Thomas' case in chief, testified that he had recommended Thomas for promotion into management because Thomas told him that he had completed the PMP. Lynch further testified that had he known Thomas had not completed the PMP and had made false statements to him, Lynch would not have recommended Thomas for promotion into management. (Pet. App. at A-64; Pet. Supp. App. at 3-4.)

(4) Prior to trial, Thomas attended over sixteen speech lessons from two English teachers in an attempt to improve his communication skills prior to trial. The speech lessons were arranged by his attorneys and held in their law offices. Denny's had informed Thomas that he needed to improve his communication skills to assist him in becoming a promotable candidate. Obviously, the jury concluded that Thomas and his attorneys agreed with Denny's, and arranged for Thomas to be tutored prior to trial. (Pet. App. at A-119; Pet. Supp. App. at 5-8.)

Additionally, Thomas' Countersummary of Facts does not accurately summarize the testimony of the managers designated. Specifically, Irene Johnson ("Johnson") testified that had she known Thomas had not completed the PMP it may have made a difference in her opinion that Thomas should be promoted. Masood Kasim ("Kasim") testified that he did not know if Thomas completed the PMP and Al Clements ("Clements") testified that he never saw Thomas function as a unit aid. (Pet. App. at A-61 to A-62; Pet. Supp. App. at 1.)

Accordingly, in light of the above as well as the additional facts set forth in the Summary of Facts section of Denny's Petition for Certiorari, the jury and trial court concluded that

Thomas failed to establish that he was qualified for promotion, and could not establish a *prima facie* case.

REPLY TO ASSERTED REASONS FOR DENYING DENNY'S PETITION FOR WRIT OF CERTIORARI

I. DENNY'S FIRST "QUESTION PRESENTED FOR REVIEW" WAS RAISED BY THE TENTH CIRCUIT'S OPINION.

As noted by Thomas, Denny's first "question presented for review" by this Court consists of the following:

> Whether, during the *prima facie* stage of a failure to promote case, plaintiff does not have to demonstrate that he at least had the same objective qualifications for the job as the person hired.

Thomas erroneously maintains that this issue is not before this Court for review. However, Denny's respectfully submits that the Tenth Circuit overruled the verdict of the jury and trial judge and ruled that the trial court's "qualified applicant" instruction was erroneous. The qualified applicant instruction presented to the jury provided as follows:

> QUALIFIED APPLICANT - DEFINED
>
> To meet his initial burden, the plaintiff must prove that he was qualified for the position for which he applied. To show that he was qualified, plaintiff must show that he possessed the necessary requirements for the position he sought. **You should consider evidence concerning the education, training or experience necessary to perform the job.** The

> plaintiff is not required to prove his qualifications were superior relative to other employees in like positions. **The plaintiff must prove, however, that he was at least as well qualified for the position as the person hired instead of him.**

The trial court instructed the jury that Thomas had to demonstrate at the *prima facie* stage of the case that he at least had the same objective qualifications for the job as the person hired. In fact, the court directed the jury to consider only **education, experience and training** in deciding whether Thomas met this burden.

In the case at bar, Denny's presented evidence at trial that Thomas did not meet the objective or subjective qualifications for the job. However, in its Opinion, the Tenth Circuit simply focused on Denny's subjective qualifications. However, as noted above, the trial court's instruction specifically directed the jury to only consider education, experience and training in determining whether Thomas had established a *prima facie* case that he was qualified for promotion.

Thomas now argues for the first time that because the objective qualifications of the job were not "posted" this Court should not review the issue noted above. Thomas erroneously relies upon EEOC v. WilTel, Inc., 81 F.3d 1508 (10th Cir. 1996) in arguing that objective qualifications of a job must be "posted" by an employer. However, the WilTel court did not rule that objective job qualifications had to be "posted." Rather, WilTel supports Denny's argument that a plaintiff must demonstrate at the *prima facie* stage of the case that he had the same objective qualifications for the job as the person selected. In WilTel, the court noted that plaintiff could not establish a *prima facie* case that she was qualified for the job because she did not have the minimum "telephone experience" required for the job.

Nevertheless, the issue in this case is whether Thomas demonstrated that he met the objective requirements for the job at the *prima facie* stage of his case. Specifically, whether he completed the PMP, business courses, and other work tasks as requested by Denny's. Thomas conceded that he was instructed to meet these objective job requirements, and the record reflects that other candidates who were promoted met these objective job requirements. (Pet. at 16.) More importantly, Thomas knew he had to complete the PMP in order to be promoted and constantly told members of management that he had completed the PMP when in fact he had not.

By ruling that the court's qualified applicant instruction was erroneous, the Tenth Circuit also ruled that Thomas did not have to demonstrate during the *prima facie* stage of his case that he at least had the same objective qualifications for the job as the person hired. Accordingly, this issue is properly before the court and should be reviewed.

II. THE TENTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS AND MISAPPLIED *KENWORTHY V. CONOCO, INC.*, 979 F.2d 1462 (10th CIR. 1992) WHEN IT CONCLUDED THAT THE TRIAL COURT'S "QUALIFIED APPLICANT" INSTRUCTION WAS ERRONEOUS.

In his Response Brief, Thomas erroneously argues that Denny's maintained at trial that Thomas was not qualified for promotion because he failed to meet subjective job requirements. However, Denny's consistently argued at trial that Thomas did not meet the objective or subjective requirements for promotion. Nevertheless, the trial court's

"qualified applicant" instruction directed the jury only to consider objective requirements during the *prima facie* stage of the case. In fact, the trial court's instruction provided in part as follows:

> **You should consider evidence concerning the education, training or experience necessary to perform the job.**

Clearly, the instruction specifically directed the jury to only consider objective criteria during the *prima facie* stage of Plaintiff's case. The jury and the trial court found that Thomas did not establish a *prima facie* case because he did not meet the objective requirements for promotion. There is absolutely no evidence in this record that the jury considered subjective criteria at the *prima facie* stage of the case as suggested by Thomas.

Thomas again argues that because Denny's did not "post" the objective requirements for promotion, the decision of the jury and the trial court should be reversed. However, Thomas never argued that he did not know the objective and subjective qualifications for promotion. In fact, he consistently maintained that he was qualified for promotion. He obviously knew that completing the PMP was necessary for promotion because he consistently told members of management that he had completed the PMP when he knew he had not. Moreover, those employees promoted instead of Thomas, completed the PMP and college courses as requested by Denny's. (Pet. at 16.)

Next, Thomas argues that because the trial court did *not* instruct the jury to consider factors other than "education, training and experience" that the jury *could* have considered subjective job requirements at the *prima facie* stage of the case, and therefore, the ruling of the Tenth Circuit should be

affirmed. Denny's respectfully submits that this argument is frivolous and suggests that trial courts be required to submit "laundry lists" to juries of items they should *not* consider at the *prima facie* stage of a failure to promote case. Denny's submits that such requirement is not practical or logical.

Finally, Thomas attempts to argue for the first time ever that Denny's did not inform him of the objective qualifications for promotion into management. There is absolutely no evidence in the record to support such an assertion. In fact, Thomas conceded that he was told to complete the PMP, take business courses and perform other work related tasks for promotion. (Pet. at 16.) As noted on Page 4 of his Response Brief, Thomas testified that, with one exception, he was better qualified than all the non-African-Americans who were promoted. Thomas definitely knew that he needed to complete the PMP for promotion and consistently misrepresented to members of management that he had completed the PMP, which was why they recommended him for promotion.

III. THE TENTH CIRCUIT OPINION CONFLICTS WITH DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER COURTS REGARDING WHEN A MIXED MOTIVE INSTRUCTION MAY BE GIVEN.

In the case at bar, the sole defense relied upon by Denny's was that Thomas was not qualified for promotion into management. Nevertheless, the Tenth Circuit relied upon the following comments allegedly made by District Leaders in reaching its decision that a mixed motive instruction should have been given:

(a) "You know Thomas has a suit against us."

(b) "We have a problem with Ronnie Thomas and his suit against Denny's."

(c) "They will never allow Ronnie to become manager."

(d) "Would you promote someone who has sued?"

The district leaders denied making these comments. Nevertheless, Denny's respectfully submits that the cases cited in Thomas' Response Brief do not support the Tenth Circuit's decision that a mixed motive instruction should have been given in this case. Specifically, in Heim v. State of Utah, 8 F.3d 1541, 1546 (10th Cir. 1993) the court relied on the Supreme Court's ruling in Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989), and ruled that,

> Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision.

Heim, 8 F.3d at 1547, quoting Price Waterhouse, 490 U.S. at 251.

In Heim, the court ruled that the remark-- "Fucking women, I hate having fucking women in the office" was not direct evidence of discriminatory intent. Heim, 8 F.3d at 1546.

Denny's respectfully submits that there is no evidence that Denny's actually relied on the fact that Thomas had filed a

lawsuit against the company for race discrimination in making its employment decision not to promote Thomas. Denny's demonstrated that Thomas could not even establish a *prima facie* case that he was objectively qualified for promotion. Moreover, there was no evidence that the alleged remarks were made in connection with an employment decision.

Also, in Ramsey v. City & County of Denver, 907 F.2d 1004, 1008 (10th Cir. 1990), cert. denied, 506 U.S. 907, 113 S. Ct. 302, 121 L. Ed. 2d 225 (1992), a woman was hired then filed a discrimination suit claiming that she was treated differently because of her gender. Like Thomas, the plaintiff in Ramsey brought a retaliation claim against her employer. The Director of the Traffic Division testified regarding his feeling about women being better suited to some jobs than to others. The court held that the evidence presented was not "direct" but was "indirect or circumstantial." The court also ruled that such statements constituted the individual's personal opinion. Similarly, in the case at bar, although the district leaders denied making the alleged remarks, the statements constitute personal opinion and not direct evidence of discrimination. The alleged remarks were insufficient to warrant a "mixed motive" instruction.

In Brown v. East Mississippi Electric Power Ass'n., 989 F.2d 858 (5th Cir. 1993), the court held that a mixed motive instruction was proper because there was direct evidence of discriminatory animus by the repeated use of racial slurs when referring to the plaintiff. The remarks included: "What do you want, nigger;" "I felt like getting my gun and killing that nigger;" and "You should have hooked that power up for that nigger. You know how they are." Id. at 861. Denny's respectfully submits that in the case at bar, the alleged statements did not constitute direct evidence of discriminatory animus and the trial court correctly ruled that a mixed motive

instruction was not proper. Finally, in Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2d Cir.), cert. denied, 506 U.S. 826, 113 S. Ct. 82, 121 L. Ed. 2d 46 (1992) the plaintiff sued his employer under the New York Human Rights Law alleging age discrimination. The court relied on federal law in reaching its decision. The court ruled that "direct evidence" means evidence that "shows that the impermissible criterion played some part in the decision making process." Id. at 1183. As noted above, Denny's respectfully submits that there was absolutely no evidence whatsoever that the alleged remarks were factors in Denny's decision making process.

In the case at bar, the trial court was able to view the witnesses, their demeanor and all the evidence presented, and properly ruled that the alleged remarks did not warrant a mixed motive instruction.

CONCLUSION

For the reasons asserted above, as well as in its Petition for Writ of Certiorari, Denny's respectfully requests that this Court grant its Petition for Writ of Certiorari in order to give guidance to the courts below.

Respectfully submitted,
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